



OFFICE OF GOVERNMENT ETHICS

5 CFR Parts 2634 and 2635

RIN 3209-AA50

Legal Expense Fund Regulation

AGENCY: Office of Government Ethics.

ACTION: Proposed rule.

SUMMARY: The U.S. Office of Government Ethics (OGE) is proposing to add a new subpart to the Standards of Ethical Conduct for Employees of the Executive Branch (Standards). The new subpart contains the standards for an employee's acceptance of payments for legal expenses through a legal expense fund and an employee's acceptance of *pro bono* legal services for a matter arising in connection with the employee's official position, the employee's prior position on a campaign of a candidate for President or Vice President, or the employee's prior position on a Presidential Transition Team. OGE is also proposing to make related amendments to the portions of the Standards that govern the solicitation and acceptance of gifts from outside sources and the portions of the Executive Branch Financial Disclosure regulation that govern confidential financial disclosure reports.

DATES: Written comments are invited and must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, in writing, to OGE on this proposed rule, identified by RIN 3209-AA50, by any of the following methods:

Email: usoge@oge.gov. Include the reference "Proposed Rule: Legal Expense Fund Regulation" in the subject line of the message.

Fax: (202) 482-9237.

Mail: Office of Government Ethics, Suite 500, 1201 New York Avenue, NW, Washington, DC 20005–3917, Attention: “Proposed Rule: Legal Expense Fund Regulation.”

Instructions: All submissions must include OGE’s agency name and the Regulation Identifier Number (RIN), 3209–AA50, for this proposed rulemaking. All comments, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. Comments may be posted on OGE’s website, www.oge.gov. Sensitive personal information, such as account numbers or Social Security numbers, should not be included. Comments generally will not be edited to remove any identifying or contact information.

FOR FURTHER INFORMATION CONTACT: Maura Leary, Assistant Counsel, or Heather Jones, Senior Counsel for Financial Disclosure, General Counsel and Legal Policy Division, Office of Government Ethics, Suite 500, 1201 New York Avenue NW, Washington, DC 20005-3917; Telephone: (202) 482-9300; TTY: (800) 877-8339; FAX: (202) 482-9237.

SUPPLEMENTARY INFORMATION:

I. Background

There is currently no statutory or regulatory framework in the executive branch for establishing a legal expense fund (LEF), and the U.S. Office of Government Ethics (OGE) has not approved or disapproved any specific LEFs. In the legislative branch, LEFs are governed by House and Senate LEF regulations. *See* House Committee on Ethics, “Contributions to a Legal Expense Fund,” U.S. House of Representatives, <https://ethics.house.gov/sites/ethics.house.gov/files/Pink%20Sheet%20With%20Regs.pdf> ; Senate Select Committee on Ethics, Senate Ethics Manual, Government Printing Office, 2003, <https://www.ethics.senate.gov/downloads/pdf/manual.pdf>, pages 30-31. OGE’s role has been limited to providing guidance to help ensure that executive branch

employees who may receive distributions from an LEF will be in compliance with existing ethics laws and rules, such as the gift rules, if they accept such a distribution. *See* OGE Legal Advisory LA-17-10 (Sept. 28, 2017). However, this limited approach to LEFs lacked transparency and created concerns regarding the appearance of corruption in the creation and operation of LEFs for the benefit of executive branch employees. *See* Letter from Emory Rounds, Director, Office of Gov't Ethics, to Sen. Margaret Wood Hassan, *et al.*, Sept. 11, 2018, [https://www.oge.gov/Web/OGE.nsf/Congressional%20Correspondence/495516AF975202A7852585B6005A1FE4/\\$FILE/Letter%20to%20Senators%20Hassan,%20Carper,%20Peters,%20Jones,%20and%20Harris.pdf?open](https://www.oge.gov/Web/OGE.nsf/Congressional%20Correspondence/495516AF975202A7852585B6005A1FE4/$FILE/Letter%20to%20Senators%20Hassan,%20Carper,%20Peters,%20Jones,%20and%20Harris.pdf?open). As a result, OGE began the process of drafting an LEF regulation with a series of public input opportunities to “allow the creation of a regulation that will ensure that [LEFs] with executive branch employee recipients will be transparent, open, and accessible to the public.” *Id.*

On April 15, 2019, OGE sought stakeholder input on issues specifically related to LEFs through an advance notice of proposed rulemaking (ANPRM). *See* Notice and Request for Comments: Legal Expense Fund Regulation, 84 FR 15146 (Apr. 15, 2019). In response to this ANPRM, OGE received written comments and heard testimony at a virtual public hearing on May 22, 2019. *See* <https://www.oge.gov/Web/oge.nsf/Resources/Rulemaking> (providing written comments and hearing transcript). OGE also solicited and considered the views of executive branch agency ethics officials. On September 26, 2019, OGE invited all interested members of the public and agency ethics officials to share ideas, provide information, and express concerns at two public meetings about specific topics related to LEFs. *See* Announcement of Public Meeting: Legal Expense Fund Regulation, 84 FR 50791 (Sept. 26, 2019). These meetings allowed interested groups to hear and respond to the concerns of other affected persons and helped OGE to further understand the views of various

constituencies. *See* <https://www.oge.gov/Web/oge.nsf/Resources/Rulemaking> (providing meeting agendas, lists of attendees, and lists of topics discussed). OGE also provided for an additional comment period. *See id.*

After considering this public input, OGE is proposing an LEF regulation that creates the framework to govern an employee's acceptance of both payments for legal expenses through an LEF and *pro bono* legal services for matters arising in connection with the employee's official position, the employee's prior position on a campaign of a candidate for President or Vice President, or the employee's prior position on a Presidential Transition Team. The proposed regulation will more clearly spell out who is a prohibited donor, establish donation caps, and require transparency in the form of quarterly, publicly available reports.

OGE has consulted with the Department of Justice and the Office of Personnel Management pursuant to section 201(a) of Executive Order 12674, as modified by Executive Order 12731, and the authorities contained in titles I and IV of the Ethics in Government Act of 1978.

II. Analysis of Proposed Rule Amendments

OGE is proposing to add a new subpart J to the Standards of Ethical Conduct for Employees of the Executive Branch (Standards). The new subpart contains the standards for an employee's acceptance of payments for legal expenses through an LEF and an employee's acceptance of *pro bono* legal services for matters arising in connection with the employee's past or current official position, the employee's prior position on a campaign of a candidate for President or Vice President, or the employee's prior position on a Presidential Transition Team (hereafter referred to as "covered legal matters"). OGE has authority to issue a legal expense fund regulation pursuant to title IV of the Ethics in Government Act of 1978; sections 201(a) and 403 of Executive Order 12674 (as modified by E.O. 12731), and 5 U.S.C. 7301, 7351(c), and 7353(b)(1). OGE is also

proposing to make related amendments to the portions of the Standards that govern the solicitation and acceptance of gifts from outside sources in subpart B (“gift rules”). Chiefly, OGE is proposing a new exception to the gift rules for legal expense payments or services for covered legal matters, so long as the payments or services are provided in accordance with proposed subpart J. Finally, OGE is proposing to make related amendments to the portions of the Executive Branch Financial Disclosure regulation that govern confidential financial disclosure reports.

Under the proposed amendments, employees must comply with proposed subpart J to accept legal expense payments from LEFs or *pro bono* legal services for any covered legal matters. However, proposed subpart J contemplates that, to the extent a gift exclusion or exception in subpart B (*e.g.*, gifts based on a personal relationship; gifts of discounts and similar benefits; employee benefits plans maintained by current or former employers) applies, an employee may continue to use those means to accept legal expense payments or services for covered legal matters instead of establishing an LEF under subpart J. The employee is required to comply with proposed subpart J or use a gift exclusion or exception in subpart B regardless of whether payments are given from a prohibited source or given because of the employee’s official position.

A. Subpart J of the Standards

Proposed subpart J contains the standards for the creation, administration, and termination of an LEF that is established to receive contributions and to make distributions of legal expense payments for covered legal matters. Proposed subpart J also contains the standards for an employee’s acceptance of *pro bono* legal services for covered legal matters.

Proposed § 2635.1002: Applicability and related considerations

Proposed § 2635.1002 describes the covered legal matters for which an employee must comply with proposed subpart J to accept legal expense payments or *pro bono* legal

services. Given the nature of the covered legal matters and their connection to the employee's government position, OGE believes it is necessary to regulate legal expense payments for covered legal matters through proposed subpart J to help ensure that employees avoid any action that might result in or create the appearance of using public office for private gain. In contrast, OGE believes that the gift rules in subpart B of the Standards are appropriate to govern gifts of legal expense payments for personal matters. Such gifts, which are not distinguishable from other personal gifts, may be accepted, for example, under the personal relationship exception or as a discount or similar benefit. These gifts do not trigger the heightened concern of payments for legal expenses arising from an employee's official position. Therefore, proposed section 1002 excludes payments for legal expenses arising from personal matters from coverage by this subpart. This treatment is largely consistent with House and Senate LEF regulations.

Proposed § 2635.1002 also makes clear that employees may accept a payment for legal expenses without having to establish and administer an LEF if that payment is otherwise permissible under a gift exclusion or exception in subpart B. When soliciting public input, OGE received a number of comments expressing concern that a legal expense fund regulation would restrict employees from accessing legal services through other allowable means. To the extent that these other means are permissible under a gift exclusion or exception in subpart B (*e.g.*, gifts based on a personal relationship; gifts of discounts and similar benefits; employee benefits plans maintained by current or former employers), an employee may continue to use those means to accept legal expense payments or services for covered legal matters instead of establishing an LEF under subpart J. OGE welcomes comment on the continued use of these exceptions for legal expense payments.

Finally, proposed § 2635.1002 reminds employees that, in addition to the rules set out in subpart J, other provisions in the Standards continue to apply to employees. Subpart J

does not override these rules, and employees must ensure that they continue to abide by them. The proposed section sets out relevant related considerations for employees (*e.g.*, gifts between employees, impartiality concerns) when accepting payments for legal expenses through an LEF or accepting *pro bono* legal services. For example, the creation and administration of an LEF may only be done in the employee's personal capacity. As a result, the payments must be solicited and accepted consistent with the provisions in subpart G of the Standards relating to the use of public office for private gain, use of nonpublic information, use of government property, and use of government time. However, this section is not all-inclusive, and employees are strongly encouraged to consult with their agency ethics officials on the application of these rules to their proposed activities.

Proposed § 2635.1003: Definitions

Proposed § 2635.1003 sets out the applicable definitions for subpart J. Although the definitions set forth in this section are largely self-explanatory, the importance of these terms in determining the coverage of this regulation warrants additional emphasis. This section defines the term "legal expense payment," which is the type of payment covered by this regulation. This section also defines "legal expense fund," a fund established, in accordance with subpart J, to receive contributions and to make distributions of the legal expense payments. The definitions of "arising in connection with the employee's past or current official position," "arising in connection with the employee's prior position on a Presidential Transition Team," and "arising in connection with the employee's prior position on a campaign" are also threshold concepts in determining whether the legal matter for which an employee beneficiary seeks to accept legal expense payments is covered by this subpart. Covered legal matters can include bringing a legal claim or being subject to a claim. If the employee's legal matter does not fall within one of these three definitions, it will be considered to be personal and will not be covered by this subpart.

Proposed § 2635.1004: Establishment

Proposed § 2635.1004 sets out the standards for establishing an LEF. OGE is proposing to require that all LEFs be structured as trusts with a single beneficiary. OGE received many comments expressing a strong preference for LEFs to be structured exclusively as trusts. The commenters emphasized that the trust structure creates a fiduciary duty between the trustee and beneficiary that, in the words of one public interest organization, “provide[s] the best protection for public servants, who could be certain that the distributions will not be withheld or disbursed according to political pressures.” Although other structures, such as LLCs, partnerships, and 527 organizations, were considered, such entities would not provide similar protections. Additionally, most commenters strongly supported allowing only a single, named beneficiary of an LEF trust. In written comments and statements during the public meetings, commenters repeatedly objected to permitting group LEFs. Several commenters voiced an overriding concern about the appearance of corruption resulting from discretionary distributions from a group LEF to employees, as well as the difficulty of properly and meaningfully screening for prohibited donors.

OGE shares these appearance concerns. Accordingly, the proposed regulation requires that employees who wish to establish a legal expense fund do so through a trust with a single, named beneficiary. OGE recognizes, however, that the financial costs and personal burdens associated with establishing a trust can create significant barriers to entry for many employees who are not wealthy, well-connected, or well-known. OGE’s proposed alternative mechanisms to receive or pay for legal services – such as *pro bono* legal services, assistance from employee welfare organizations, and existing gift rule exceptions – address some of the access concerns for employees who do not have the financial or other means to establish or effectively raise money through an LEF. However, given the concern that the single-beneficiary trust structure may prevent some

executive branch employees from receiving financial assistance, OGE is soliciting additional comment on single-beneficiary versus multiple-beneficiary trusts.

Proposed § 2635.1004 sets out limitations on who may serve as an LEF trustee. The section requires legal expense funds to be administered by a trustee who is not: (1) the employee beneficiary, (2) their spouse, parent, or child, (3) another federal employee, (4) an agent of a foreign government, (5) a lobbyist, or (6) a person who has interests substantially affected by the performance or nonperformance of the employee beneficiary's official duties. These limitations are proposed to ensure that the trustee is independent from the employee beneficiary and can perform the trustee's fiduciary duties without interference. Several commenters emphasized the importance of such limitations on who may serve as trustee.

Proposed § 2635.1004 further requires employees seeking to establish an LEF to submit an LEF trust document to the employee's Designated Agency Ethics Official (DAEO) for approval, unless the employee is an anonymous whistleblower who chooses to submit the document to OGE for review and approval. The DAEO must then review the LEF trust document for compliance with the regulation. If the LEF trust document is compliant, the DAEO must approve the document. Once the DAEO approves the LEF trust document, the signed document must be forwarded to OGE within seven calendar days. At that point, the employee beneficiary may begin to accept contributions and distributions through the LEF. OGE believes agency ethics officials should initially review and approve LEF trust documents, as the executive branch ethics program has a decentralized structure in which agency ethics officials have primary responsibility for their agency's ethics program. These ethics officials understand the work of the agency and are best suited to be able to identify potential conflicts of interest.

However, OGE recognizes the need for heightened scrutiny and consistency across the executive branch with regard to the most senior executive branch employees.

Accordingly, OGE will conduct a secondary review of the LEF trust documents of the employees whose financial disclosure reports are reviewed by OGE pursuant to the Ethics in Government Act, 5 U.S.C. app. 103, as well as the documents of all White House Office and Office of the Vice President employees. OGE will review the LEF trust document to determine whether it conforms with the requirements established by this subpart. During this review period, an employee beneficiary may continue to accept contributions and distributions through the DAEO-approved LEF trust. However, if the LEF trust document is defective or non-compliant, OGE will notify the approving agency and the employee beneficiary or the employee beneficiary's trustee or representative, who will have 30 calendar days to take necessary corrective action. Additionally, OGE will review and approve LEF trust documents for anonymous whistleblowers who elect not to file with their agency. In that unusual circumstance, the agency DAEO will not be made aware of an anonymous whistleblower's trust documents in order to screen for potential conflicts requiring recusal. OGE believes the importance of anonymity for whistleblowers outweighs the benefit gained by agency ethics officials being able to screen for potential conflicts, because the potential donors most likely to present significant conflicts issues are prohibited from donating to LEFs. In addition, OGE will review the trust documents of anonymous whistleblowers for conflicts of interest, which could lead to the employee returning donations or recusing from conflicts, as needed.

Under proposed section 2635.1004, employee beneficiaries are required to have the trust document approved by the DAEO before being able to accept contributions. This step mirrors the procedures used by the legislative branch and ensures that the LEF will be in compliance with the proposed rule. All approved, signed LEF trust documents, except for those of anonymous whistleblowers, will be made publicly available on OGE's website. Although employees may only establish or maintain one LEF trust at a time, if multiple legal matters arise at the same time, the scope of an existing trust may be

amended. If a second legal issue arises, that employee may establish a second fund for that separate legal matter after that employee has terminated the first LEF.

Proposed § 2635.1005: Administration

Proposed § 2635.1005, in conjunction with proposed § 2635.1006, sets out the standards for the administration of an LEF. In response to various comments on the importance of having an independent trustee with a fiduciary duty to the employee beneficiary, proposed § 2635.1005 specifies the duties and powers of the trustee as the fiduciary for the employee beneficiary. This section also makes clear that an employee beneficiary may not exercise control over the LEF property, which further ensures the trustee's independence.

Proposed § 2635.1006: Contributions and use of funds

Proposed § 2635.1006 provides that an LEF may only accept contributions of payments for legal expenses from permissible donors, and lists the types of donors who are prohibited. OGE modeled this section after the House and Senate LEF rules, which list the types of donors who are (and are not) permitted to donate. OGE believes that providing a list of prohibited donors will assist the trustee in complying with this section, and will result in increased transparency for the public about who is a prohibited donor. Inherent in this process is the expectation that the trustee will need to consult with the DAEO as needed.

Many commenters shared similar views on the types of donors most likely to raise potential appearance of corruption concerns. Several commenters also sought a prohibition on donations from organizations because the source of an organization's funding may be unknown to an employee beneficiary and the agency ethics official. Although the House and Senate LEF rules do not prohibit most donations from organizations, OGE nonetheless believes that limiting the donors to individuals will provide additional safeguards against corruption and the appearance of corruption, as

well as provide for easier screening by the trustee. Currently, OGE has proposed only a narrow exception permitting donations from a national committee of a political party or donations from campaigns, in the case of former members of a campaign of a candidate for President or Vice President. This narrow exception only applies if the donation is not otherwise prohibited by law and the entity is not substantially affected by the performance or nonperformance of an employee beneficiary's official duties. OGE believes that existing campaign finance rules provide sufficient transparency. However, OGE is soliciting additional comment on expanding the exception to allow certain nonprofit organizations, such as 501(c)(3) and 501(c)(4) organizations, to donate to an employee's LEF.

With regard to individual contribution limits, commenters proposed amounts ranging from \$5,000 to \$250,000. House LEF rules limit contributions to \$5,000 per year, while Senate LEF rules limit contributions to \$10,000 per year. OGE is proposing a contribution limit of \$10,000 per year from any single permissible donor. OGE's proposed annual limit is consistent with the annual limit imposed by the Senate. OGE believes that this limit, combined with the proposed requirement that contributions generally must come from individuals, adequately balances an employee beneficiary's need for legal expense payments with potential appearance of corruption concerns. The proposed approach, which places no limit on the number of donors, prevents employees from relying on any single source for donations. OGE welcomes comment on this proposed approach.

Proposed § 2635.1006 also sets out the permissible uses of funds. Several commenters emphasized the importance of limiting the use of LEF payments to those uses related to defraying the employee's legal costs, and not allowing use for other reasons, such as partisan political purposes. OGE agrees, and included this requirement in the regulation in order to clarify the fiduciary responsibilities of the trustee and to

reassure the public and donors that the donations are being used for legal expenses as defined in this subpart.

Proposed § 2635.1007: Reporting requirements

Proposed § 2635.1007 sets out the quarterly and employment termination reporting requirements. OGE received many comments stating that contributions and distributions through LEFs should be made publicly available on a regular basis. Most of the comments OGE received suggested that OGE make quarterly reports available to the public, which mirrors the LEF reporting requirements of the legislative branch. OGE has incorporated this requirement into the proposed regulation, and set the proposed reporting threshold at \$250, which is the threshold set in the House LEF rules and higher than the \$25 threshold set in the Senate LEF rules.

The proposed regulation requires agency ethics officials to review the quarterly reports of most employees for compliance with the regulation. The proposed regulation also requires OGE to conduct a secondary review of the quarterly reports of the most senior employees, as well as anonymous whistleblowers who elect not to file with their agency. As with the initial certification, trustees filing quarterly reports should consult with agency ethics officials when necessary. When approving a report filed under this section, agency ethics officials will make determinations to the best of their ability based on the information they have been provided. If an improper donation is discovered in the course of the review or by the public at a later time, the beneficiary, with the assistance of the trustee, must return the donation.

Under the proposed rule, all quarterly reports, except for those of anonymous whistleblowers, will be made publicly available on OGE's website. The primary goal of the public posting requirement is transparency. In 2004, OGE issued a letter stating that the public reporting provisions of the Ethics in Government Act (EIGA) constitute the exclusive authority under OGE's jurisdiction to require public financial disclosure. OGE

Inf. Adv. Op. 04x3 (Apr. 19, 2004). This statement stems from the following language in EIGA: “[T]he provisions of this title [title I] requiring the reporting of information shall supersede any *general* requirement under any other provision of law or regulation with respect to the reporting of information required for purposes of preventing conflicts of interest or apparent conflicts of interest.” 5 U.S.C. app. 107(b) (emphasis added). OGE does not consider the proposed LEF reporting requirement to be a “general” public financial disclosure reporting requirement that would be superseded by EIGA. The reporting provision is not “applicable to the occupants of positions . . . that are categorized by the provision in general terms.” *See* 4B Op. O.L.C. 566 (Apr. 11, 1980) (discussing the prerequisites for the supersession by EIGA of a statutory or regulatory reporting requirement). Rather, the requirement to report only applies to employees who choose to establish an LEF pursuant to these regulations.

In proposed § 2635.1007, OGE also recognizes the need for penalties for noncompliance with the standards set forth in the proposed regulation. If an LEF receives an impermissible contribution, that contribution must be returned to the donor as soon as practicable but no later than the next reporting due date. If a report is filed after a due date, the employee may not accept contributions or distributions until the report is filed. Additionally, OGE will retain the authority to indefinitely prohibit employees from accepting contributions or distributions from an LEF if there is continuing or significant noncompliance.

Proposed § 2635.1008: Termination of a legal expense fund

Proposed § 2635.1008 sets out the reasons an employee beneficiary may terminate an LEF and provides requirements for distributing excess funds. OGE received comments suggesting that unused funds should be returned to the donors on a *pro rata* basis or donated to a 501(c)(3) organization upon termination of an LEF, consistent with the House and Senate rules. Because of the difficulties inherent in returning funds to donors

(i.e., locating donors and ensuring timely return of funds), proposed § 2635.1008 requires a trustee to distribute excess funds to a 501(c)(3) organization within 90 days of termination. The organization must not be one that is established by the employee beneficiary, nor an organization with which the employee has a covered relationship within the meaning of § 2635.502(b)(1), nor can the beneficiary or the beneficiary's spouse or child be an officer, director, or employee of the organization. Additionally, the proposed regulation requires a trust termination report that serves as a final quarterly report and indicates the organization to which the excess funds were donated. OGE requests comment on whether the 501(c)(3) should or should not be named at the formation of the trust, or whether the selection of the 501(c)(3) should be left to the discretion of the trustee.

Proposed § 2635.1009: Pro bono legal services

Proposed § 2635.1009 addresses employees' acceptance of *pro bono* legal services. Most commenters were in favor of permitting acceptance of appropriate *pro bono* legal services by employees, with sufficient limitations. Moreover, several commenters identified problems inherent in overly restricting acceptance of *pro bono* services, including potential interference in attorney/client relationships and curtailing access to needed legal assistance for government employees. Accordingly, OGE has proposed rules specifically governing the acceptance of *pro bono* legal services, including *pro bono* services from public interest organizations. Proposed § 2635.1009 would prohibit employees from accepting *pro bono* services from lobbyists, foreign governments or agents, or persons substantially affected by the performance or nonperformance of the employees' duties. The proposed rule otherwise permits employees to accept *pro bono* services in connection with covered legal matters. Additionally, OGE's rule as drafted allows employees to accept *pro bono* services directly from entities providing the legal services (such as law firms or nonprofits). However, OGE is soliciting comments on

whether employees may accept legal services at a reduced cost or free of charge when the legal services are paid for by a nonprofit organization, such as a 501(c)(3) or 501(c)(4), but the services are provided by attorneys outside of that organization.

B. Regulatory Amendments to Subpart B of the Standards

OGE is proposing to make related amendments to the portions of the Standards that govern the solicitation and acceptance of gifts from outside sources, subpart B.

Specifically, OGE is proposing a new exception for certain legal expense payments and *pro bono* legal services provided in accordance with proposed subpart J. OGE is also proposing to revise § 2635.204(c) of the gift rules to clarify that an established employee organization may provide legal services pursuant to this section.

Proposed § 2635.204(n): Exception for Legal Expense Funds and Pro Bono Legal Services

OGE is proposing a new exception to the gift rules for legal expense payments or services for covered legal matters, so long as the payments or services are provided in accordance with proposed subpart J. However, regardless of whether an employee's legal expense payments or services for covered legal matters are from a prohibited source or given because of official position, that employee will still be subject to the requirements and safeguards established in subpart J.

Proposed § 2635.204(c): Discounts and Similar Benefits

OGE proposes revising § 2635.204(c) of the gift rules to clarify that an established employee organization may pay legal expenses pursuant to this section. The question of whether employees may accept free or discounted legal services through established employee organizations, such as unions or employee welfare organizations, arose during this regulatory process. OGE is aware that agencies have used § 2635.204(c)(2)(ii) to accept gifts of services (*e.g.*, financial counseling, visiting nurses) from employee benefit organizations. However, the language of this exception as currently written is ambiguous.

Accordingly, OGE proposes language under new § 2635.204(c)(2)(iv) to clarify that employees may properly accept opportunities and benefits (including, but not limited to, legal services) offered by an established employee organization, when eligibility is based on the employee's status as an agency employee. OGE added a new § 2635.204(c)(2) exception rather than amend existing § 2635.204(c)(2)(ii) because OGE did not want to confuse the intended purposes of the separate exceptions or link employee acceptance of benefits from employee organizations to similar benefits offered to the general public by outside groups. The proposed new exception is limited to "established" employee organizations, such as employee welfare groups for Federal employees, because the purpose of this exception is to allow employees to accept opportunities and benefits from pre-existing employee organizations with a general mission of providing assistance to agency employees, rather than from organizations established as a response to a specific investigation or established to help a specific employee. An employee organization need not be established before this regulation going into effect; rather, the organization should be established before a legal matter arises.

C. Regulatory Amendments to Confidential Financial Disclosure Reporting Requirements

OGE is proposing to revise § 2634.907(g)(5) of part 2634 to remove the requirement that anonymous whistleblowers who happen to be confidential financial disclosure report filers report gifts for payment of legal expenses related to the whistleblowing activity. Confidential financial disclosure reports are always reviewed by the ethics office of a filer's agency and are often reviewed by the filer's supervisor. The disclosure of the payment of legal expenses as gifts may reveal the whistleblower, which would undermine the protections that whistleblowers are provided under the various whistleblower protection statutes. *See* 5 U.S.C. 2302(b)(8), (b)(9)(C); *see also* 5 U.S.C. app. II, 8H; 50 U.S.C. 3033, 3517; 28 CFR 27.1. OGE believes the possible harm to an anonymous

whistleblower outweighs the value of disclosing the information, particularly given requirements in proposed subpart J. In addition, during OGE's information gathering process several public interest groups expressed support for maintaining the anonymity of whistleblowers. At this time, OGE is unable to propose a similar exception for public financial disclosure filers because there is no such exception in the Ethics in Government Act, 5 U.S.C. app. 102(a)(2).

III. Matters of Regulatory Procedure

Regulatory Flexibility Act

As Director of the Office of Government Ethics, I certify under the Regulatory Flexibility Act (5 U.S.C. chapter 6) that this proposed rule will not have a significant economic impact on a substantial number of small entities because it primarily affects current Federal executive branch employees.

Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) applies because this regulation creates information collection requirements that require approval of the Office of Management and Budget. The information collection requirements imposed by the proposed regulation are directed at beneficiaries of legal expense funds, who are current executive branch employees. OGE notes that an employee beneficiary who is leaving executive branch employment is required to file an employment termination report no later than their last day of employment. At the same time, a 30-day filing extension may be granted for good cause shown. Although it is possible that a beneficiary may file a termination report after leaving government service after having received an extension, the information collection requirement is directed toward current employees. OGE also notes that there are no independent information collection requirements on trustees.

In fulfilling the regulatory requirements, employee beneficiaries must in turn collect information from (1) donors who contribute to the legal expense fund for the payment of

legal expenses and (2) payees who receive payments distributed from the legal expense fund. Together, this information collection is titled “OGE Legal Expense Fund Information Collection.”

OGE plans to seek Paperwork Reduction Act approval of this new information collection. The purposes of the OGE Legal Expense Fund Information Collection include, but are not limited to, obtaining information relevant to a conflict-of-interest determination, and disclosing on the OGE website information submitted pursuant to 5 CFR part 2635, subpart J. The authority for this information collection is addressed in the Supplementary Information section.

OGE estimates that there will be approximately 110 Respondents annually. It is anticipated that there may be an average of five legal expense fund trusts in existence each year. Each trust is anticipated to have approximately 20 donors, whose reporting requirements are tied to the frequency with which they donate, and approximately two payees, who will submit information each time they receive a distribution.

OGE estimates that the total annual burden will be approximately 9 to 10 hours. OGE estimates the estimated time per response to be an average of 5 minutes, with respect to each donor or payee communication to an employee beneficiary.

These estimates are based in part on OGE’s knowledge of several legal expense funds that have been established for Executive branch employees, as well as OGE’s consultation with the U.S. House of Representatives and the U.S. Senate regarding the legal expense funds that they oversee.

Request for Comments

Agency and public comment is invited specifically on the need for and practical utility of this information collection, the accuracy of OGE’s burden estimate, the enhancement of quality, utility, and clarity of the information collected, and the minimization of burden (including the use of information technology). OGE is currently

exploring methods for collecting this information, and is seeking public comment.

Potential methods may include, for example, the use of standard forms.

Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. chapter 5, subchapter II), this proposed rule will not significantly or uniquely affect small governments and will not result in increased expenditures by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (as adjusted for inflation) in any one year.

Executive Order 13563 and Executive Order 12866

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select the regulatory approaches that maximize net benefits (including economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This proposed rule has been designated as a “significant regulatory action” although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, this rule has been reviewed by the Office of Management and Budget.

Currently, executive branch employees may accept gifts to pay for legal expenses from others directly and can also establish funds to accept donations for such expenses, as long as the employee remains in compliance with the gift restrictions in subparts B and C of the Standards of Conduct and the criminal conflict of interest statutes. *See, e.g.*, OGE Legal Advisory LA-18-11 (Sept. 12, 2018); OGE Legal Advisory LA-17-10 (Sept. 28, 2017). In other words, there are currently costs for employees who establish an LEF in order to ensure compliance with ethics rules even in the absence of OGE’s new proposed framework in subpart J, but compliance can be difficult and confusing as the

current rules do not address these types of gifts specifically. OGE's role is currently limited to providing an LEF trust template or to providing technical assistance to help ensure that executive branch employees who may receive distributions from an LEF will be in compliance with existing ethics laws and rules.

Based on OGE's current experience under the status quo, it is estimated that approximately five executive branch employees may seek to establish or maintain an LEF annually. The proposed new framework will consist of the following activities: establishment of the LEF trust; submission of trust documentation for agency review and approval; review and approval by OGE (where applicable); LEF trustee soliciting and accepting donations; LEF trustee screening donations to ensure the donor is permissible; LEF trustee overseeing distributions from the trust for the employee's legal expenses; preparing quarterly reports of contributions to and distributions from the LEF; submission of quarterly reports for agency review; review by OGE (where applicable); preparation of trust termination reports and/or employment termination reports; submission of those reports for agency review and OGE review (where applicable); and communications regarding all of the above. OGE estimates that the annual time burden for all of the above is 100 hours. Using an estimated rate \$325 per hour for the services of a professional trust administrator or private representative, the estimated annual cost burden is \$32,500. *See* Clio, Legal Trends Report 55 (2019), <https://www.clio.com/resources/legal-trends/2019-report/> (calculating an average hourly rate of \$319 for trust lawyers nationally). However, OGE estimates that the annual time burden under the status quo, if an employee establishes a legal expense fund that needs to comply with existing ethics rules, is 75 hours with an annual cost burden of \$24,375. Thus, the net increase from the status quo is approximately \$8,125 per fund. The estimate of 75 hours is based, in part, on the estimated time burden for OGE's qualified trust program. *See* 84 FR 67743. That number was reduced because the status quo does not

require review and approval of trusts or submission of reports to agencies and OGE.

Under the status quo, a significant time burden does exist because the lack of a detailed framework requires additional research by employee representatives, consultation with agency ethics officials and OGE, and a more detailed review of each LEF donor in the absence of an enumerated list of permissible donors. The additional 25-hour estimate is based on the specific submissions required by proposed 5 CFR part 2635, subpart J.

Specifically, submission of LEF trust fund establishing documents, quarterly reports, and termination reports; review by agencies and OGE of those submissions; and corresponding communications will increase the cost burden in comparison to the status quo. The burden on LEF donors specifically is unchanged because they would need to provide the same level of information under the status quo.

The benefits from implementing this new regulatory structure are significant. Employees' acceptance of payments for legal expenses relating to their official duties has triggered concerns from outside groups, Congress, and the media, in terms of appearance of corruption/corruption issues and a desire for transparency. Creating this regulation will provide a framework for screening for conflicts of interest and transparency, which will serve to protect both the agency and the employee. Further, the regulation will provide clarity to executive branch employees by articulating the process for establishing an LEF and the requirements in maintaining one, including: defining prohibited donors, donation caps, review and approval of trust fund documents, and the submission of quarterly, publicly available reports. As a result of these requirements, as well as the increased public reporting requirements, the public will have increased confidence in the decision making of executive branch employees who accept gifts of legal expenses consistent with the new proposed subpart J.

Executive Order 12988

As Director of the Office of Government Ethics, I have reviewed this proposed rule in

light of section 3 of Executive Order 12988, Civil Justice Reform, and certify that it meets the applicable standards provided therein.

Executive Order 13175

The Office of Government Ethics has evaluated this proposed rule under the criteria set forth in Executive Order 13175 and determined that tribal consultation is not required as this proposed rule has no substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

List of Subjects

5 CFR Part 2634

Certificates of divestiture, Conflict of interests, Financial disclosure, Government employees, Penalties, Privacy, Reporting and recordkeeping requirements, Trusts and trustees.

5 CFR Part 2635

Conflict of interests, Executive branch standards of ethical conduct, Government employees.

Approved: April 12, 2022.

Emory Rounds,

Director, U.S. Office of Government Ethics.

For the reasons set forth in the preamble, the U.S. Office of Government Ethics proposes to amend 5 CFR parts 2634 and 2635 as follows:

PART 2634—EXECUTIVE BRANCH FINANCIAL DISCLOSURE, QUALIFIED TRUSTS, AND CERTIFICATES OF DIVESTITURE

1. The authority citation for part 2634 continues to read as follows:

Authority: 5 U.S.C. app.; 26 U.S.C. 1043; Pub. L. 101-410, 104 Stat. 890, 28 U.S.C. 2461 note, as amended by Sec. 31001, Pub. L. 104-134, 110 Stat. 1321 and Sec. 701, Pub. L. 114-74; Pub. L. 112-105, 126 Stat. 291; E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306.

2. Amend § 2634.907 by:

a. Revising paragraph (g)(5); and

b. Designating the example following paragraph (g)(5) as Example 1 to paragraph (g).

The revision reads as follows:

§ 2634.907 Report contents.

* * * *

(g) * * *

(5) *Exceptions.* Reports need not contain any information about:

(i) Gifts and travel reimbursements received from relatives (see § 2634.105(o)).

(ii) Gifts and travel reimbursements received during a period in which the filer was not an officer or employee of the Federal Government.

(iii) Any food, lodging, or entertainment received as “personal hospitality of any individual,” as defined in § 2634.105(k).

(iv) Any payments for legal expenses from a legal expense fund or the provision of *pro bono* legal services, as defined in subpart J of part 2635 of this chapter, or any payments for legal expenses or the provision of *pro bono* legal services that otherwise qualify for a gift exclusion or gift exception in subpart B of part 2635 of this chapter, if the confidential filer is an anonymous whistleblower as defined by § 2635.1003 of this chapter.

(v) Any exclusions specified in the definitions of “gift” and “reimbursement” at § 2634.105(h) and (n).

* * * *

**PART 2635—STANDARDS OF ETHICAL CONDUCT FOR EMPLOYEES OF
THE EXECUTIVE BRANCH**

3. The authority citation for part 2635 continues to read as follows:

Authority: 5 U.S.C. 7301, 7351, 7353; 5 U.S.C. App. (Ethics in Government Act of 1978); E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306.

4. Amend § 2635.203 by adding paragraphs (h) and (i) to read as follows:

§ 2635.203 Definitions.

* * * * *

(h) *Legal expense fund* has the meaning set forth in § 2635.1003.

(i) *Pro bono legal services* has the meaning set forth in § 2635.1003.

5. Amend § 2635.204 by:

- a. Removing the word “or” at the end of paragraph (c)(2)(ii);
- b. Removing the period at the end of paragraph (c)(2)(iii) and adding “; or” in its place;
and
- d. Adding paragraph (c)(2)(iv), example 4 to paragraph (c)(2), and paragraph (n).

The additions read as follows:

§ 2635.204 Exceptions to the prohibition for acceptance of certain gifts.

* * * * *

(c) * * *

(2) * * *

(iv) Offered to employees by an established employee organization, such as an employee welfare group for Federal employees, because of the employees’ Government employment, so long as the employee is part of the class of individuals eligible for assistance from the employee organization as set forth in the organization’s governing documents.

* * * * *

Example 4 to paragraph (c)(2): A military relief society provides access to financial counseling services, loans, and grants to all sailors and Marines. Service members may accept such benefits because the services are offered by an employee organization that was established before the matter arose and in which membership is because of the employees' Government employment.

* * * * *

(n) *Legal expense funds and pro bono legal services.* An employee who seeks legal representation for a matter arising in connection with the employee's official position, the employee's prior position on a campaign of a candidate for President or Vice President, or the employee's prior position on a Presidential Transition Team may accept:

(1) Payments for legal expenses paid out of a legal expense fund that is established and operated in accordance with subpart J of this part; and

(2) *Pro bono* legal services provided in accordance with subpart J of this part.

6. Add subpart J to read as follows:

Subpart J – Legal Expense Funds

Sec.

2635.1001 Overview.

2635.1002 Applicability and related considerations.

2635.1003 Definitions.

2635.1004 Establishment.

2635.1005 Administration.

2635.1006 Contributions and use of funds.

2635.1007 Reporting requirements.

2635.1008 Termination of a legal expense fund.

2635.1009 *Pro bono* legal services.

§ 2635.1001 Overview.

This subpart contains standards for an employee's acceptance of payments for legal expenses through a legal expense fund and an employee's acceptance of *pro bono* legal services. Legal expenses covered by this subpart are those for a matter arising in connection with the employee's past or current official position, the employee's prior position on a campaign, or the employee's prior position on a Presidential Transition Team.

§ 2635.1002 Applicability and related considerations.

(a) *Applicability.* This subpart applies to an employee who seeks to accept payments for legal expenses from a legal expense fund or the provision of *pro bono* legal services. The legal expenses or the provision of *pro bono* legal services must be for a matter arising in connection with the employee's past or current official position, the employee's prior position on a campaign, or the employee's prior position on a Presidential Transition Team.

(b) *Not covered by this subpart.* The following types of payments for legal expenses or *pro bono* legal services are not covered by this subpart:

(1) *Personal matters.* Payments for legal expenses or the provision of *pro bono* legal services related to matters that do not arise in connection with the employee's past or current official position, the employee's prior position on a campaign, or the employee's prior position on a Presidential Transition Team, such as a matter that is primarily personal in nature, are not covered by this subpart. Personal matters include, but are not limited to, tax planning, personal injury litigation, protection of property rights, family law matters, and estate planning or probate matters.

Example 1 to paragraph (b)(1): A Department of Homeland Security employee wants to set up a legal expense fund in connection with the employee's divorce and custody proceeding. This is a personal matter and the employee may not establish a legal expense fund under this subpart, but may use other gift exceptions and exclusions in accordance with subparts B and C of this part as appropriate.

(2) *Gifts acceptable according to a gift exclusion or exception.* Payments for legal expenses or the provision of *pro bono* legal services that otherwise qualify for a gift exclusion or exception other than § 2635.204(n) are not covered by this subpart.

Example 1 to paragraph (b)(2): A Central Intelligence Agency employee is facing administrative disciplinary action due to an issue with the employee's security clearance and would like to seek financial assistance to pay for an attorney. Even though this matter arose in connection with their official position, if the employee's parents offer to cover the legal expenses, that donation is not subject to this subpart, as it would be subject to the gift exception at § 2635.204(b).

NOTE 1 TO PARAGRAPH (b): Acceptance of legal expense payments or *pro bono* legal

services not covered by this subpart must be analyzed under subpart B of this part.

(c) *Related considerations*--(1) *Gifts between employees*. Acceptance of legal expense payments or the provision of *pro bono* legal services from another employee must be analyzed under 18 U.S.C. 205 and subpart C of this part.

(2) *Impartiality*. An employee beneficiary will be treated as having a covered relationship for one year within the meaning of § 2635.502(b)(1) with a legal expense fund's trustee and donors, as well as any *pro bono* legal services providers. The one-year period of disqualification for each donor begins to run on the most recent date the legal expense fund donation is received from that donor or, in the case of *pro bono* services, the last date *pro bono* services were provided. The employee beneficiary must take appropriate steps to avoid an appearance of loss of impartiality in the performance of their official duties in accordance with § 2635.502.

Example 1 to paragraph (c)(2): A donor contributed to a Social Security Administration (SSA) employee's legal expense fund. Three months after this contribution was made, the donor submitted a disability claim. Under the circumstances, the SSA employee would be correct in concluding that a reasonable person would be likely to question the employee's impartiality if the employee were to participate in evaluating that disability claim.

(3) *Misuse of position*. Legal expense fund payments must be solicited and accepted consistent with the provisions in subpart G of this part relating to the use of public office for private gain, use of nonpublic information, use of Government property, and use of Government time.

Example 1 to paragraph (c)(3): A Transportation Security Administration (TSA) employee retains legal counsel due to an investigation into inappropriate behavior in their department, and the employee establishes a legal expense fund in accordance with this subpart. Neither the employee nor the legal expense fund's trustee may use the TSA agency seal in materials to imply the Government endorses the legal expense fund, or use nonpublic details of the investigation to solicit contributions to the legal expense fund. Further, the employee may not task subordinates with any work relating to administration of the legal expense fund.

(4) *Financial disclosure*. In addition to the legal expense fund reporting requirements outlined in § 2635.1007, an employee beneficiary who is a public or confidential filer,

other than a confidential filer who is an anonymous whistleblower, under part 2634 of this chapter must report gifts of legal expense payments accepted from sources other than the United States Government, including gifts of *pro bono* services, on the employee's financial disclosure report, subject to applicable thresholds and exclusions.

§ 2635.1003 Definitions.

For purposes of this subpart:

Anonymous whistleblower means an employee who makes or believes to be making a protected report or disclosure under 5 U.S.C. 2302(b)(8), 5 U.S.C. 2302(b)(9)(C), 5 U.S.C. app. II, 8H, 50 U.S.C. 3517, 50 U.S.C. 3033, or 28 CFR 27.1, and who seeks to remain anonymous.

Arising in connection with the employee's past or current official position means the employee's involvement in the legal matter would not have arisen had the employee not held the status, authority, or duties associated with the employee's past or current Federal position.

Example 1 to this definition of "arising in connection with the employee's past or current official position": A Department of Transportation employee is being investigated by the Inspector General for potential misuse of Government resources while on official travel. The Internal Revenue Service (IRS) is separately investigating the employee for misreporting household income on the employee's personal taxes. The employee may use this subpart to establish a legal expense fund concerning the Inspector General investigation because the legal matter arose in connection with their official position. However, this subpart would not apply to the unrelated IRS investigation because that legal matter did not arise in connection with the employee's official position.

Example 2 to this definition of "arising in connection with the employee's past or current official position": A senior military officer faces court-martial charges for sexual harassment of a junior officer. All of the charged misconduct occurred outside official duty hours. Because the officer would not be subject to the Uniform Code of Military Justice had the officer not held their official position, the officer may establish a legal expense fund in accordance with this subpart.

Arising in connection with the employee's prior position on a campaign means the employee's involvement in the legal matter would not have arisen had the employee not held the status, authority, or duties associated with the employee's prior position on a campaign of a candidate for President or Vice President.

Arising in connection with the employee's prior position on a Presidential Transition Team means the employee's involvement in the legal matter would not have arisen had the employee not held the status, authority, or duties associated with the employee's prior position as a member of the staff of a Presidential Transition Team.

Employee beneficiary means an employee as defined by § 2635.102(h) for whose benefit a legal expense fund is established under this subpart.

Legal expense fund means a fund established to receive contributions and to make distributions of legal expense payments.

Legal expense payment or payment for legal expenses means anything of value received by an employee under circumstances that make it clear that the payment is intended to defray costs associated with representation in a legal, congressional, or administrative proceeding.

Pro bono legal services means legal services provided without charge to the employee beneficiary or for less than market value as defined in § 2635.203(c) to an employee who seeks legal representation for a matter arising in connection with the employee's official position, the employee's prior position on a campaign, or the employee's prior position on a Presidential Transition Team.

§ 2635.1004 Establishment.

(a) *Structure.* A legal expense fund must be established as a trust that conforms with the requirements of this part and applicable state law. To the extent the requirements of this part and applicable state law are incompatible, the Director of the Office of Government Ethics may permit such deviations from this part as necessary to ensure compatibility with applicable state law.

(b) *Grantor.* The legal expense fund must be established by the employee beneficiary.

(c) *Trustee.* A legal expense fund must be administered by a trustee who is not:

(1) The employee beneficiary;

- (2) A spouse, parent, or child of the employee beneficiary;
- (3) Any other employee of the Federal executive, legislative, or judicial branches;
- (4) An agent of a foreign government as defined in 5 U.S.C. 7342(a)(2);
- (5) A lobbyist as defined by 2 U.S.C. 1602(10) who is currently registered pursuant to 2 U.S.C. 1603(a); or
- (6) A person who has interests that may be substantially affected by the performance or nonperformance of the employee beneficiary's official duties.

(d) *Employee beneficiary.* (1) Except as provided in paragraph (d)(2) of this section, a legal expense fund must be established for the benefit of a single, named employee beneficiary.

(2) A legal expense fund for the benefit of an anonymous whistleblower may be established without disclosing the identity of the anonymous whistleblower to anyone other than the trustee.

(e) *Filing and approval of legal expense fund trust document.* An employee beneficiary may not solicit or accept contributions or distributions through a legal expense fund before:

(1) Filing the legal expense fund document in accordance with paragraph (f) of this section; and

(2) Receiving approval for the legal expense fund in accordance with paragraph (g)(1) of this section.

(f) *Filing of legal expense fund trust document.* (1) The employee beneficiary, or the trustee or representative of the employee beneficiary, must file the legal expense fund trust document with the designated agency ethics official at the agency where the employee beneficiary is employed.

(2) An employee beneficiary who is an anonymous whistleblower may choose to file a legal expense fund trust document anonymously through the employee beneficiary's

trustee or representative with the Office of Government Ethics only. If the Office of Government Ethics receives a legal expense fund trust document from a covert employee of the Intelligence Community, the Office of Government Ethics will handle the document as classified, according to procedures agreed upon with the employee's agency.

(g) *Approval of legal expense fund trust document--(1) Designated agency ethics official approval.* The designated agency ethics official must determine, based on the submitted trust document and information regarding the trustee, whether to approve a legal expense fund trust document filed by an employee beneficiary, other than an anonymous whistleblower choosing to file with the Office of Government Ethics, within 30 calendar days of filing.

(i) *Standard for approval.* The designated agency ethics official must approve a legal expense fund that is, based on the submitted trust document and information regarding the trustee, in compliance with this subpart.

(ii) *Transmission of trust documents to the Office of Government Ethics.* Following approval, the signed legal expense fund trust document must be forwarded to the Office of Government Ethics within seven calendar days.

(iii) *Exception for anonymous whistleblowers.* The Office of Government Ethics will serve as the approving authority for anonymous whistleblowers who choose to file a legal expense fund trust document anonymously with the Office of Government Ethics only.

(2) *Office of Government Ethics review.* Following approval by the designated agency ethics official, the Office of Government Ethics will conduct a second review of the legal expense fund trust documents of the employee beneficiaries listed in paragraph (g)(2)(ii) of this section within 30 calendar days of receipt.

(i) *Standard for review.* The Office of Government Ethics will review the legal expense fund trust document to determine whether it conforms with the requirements

established by this subpart. If defects are ascertained, the Office of Government Ethics will bring them to the attention of the approving agency and the employee beneficiary or the employee beneficiary's trustee or representative, who will have 30 calendar days to take necessary corrective action.

(ii) *Employee beneficiaries requiring secondary Office of Government Ethics review.*

The Office of Government Ethics will review the legal expense fund trust documents of the following employee beneficiaries:

(A) The Postmaster General;

(B) The Deputy Postmaster General;

(C) The Governors of the Board of Governors of the United States Postal Service;

(D) A designated agency ethics official;

(E) Employees of the White House Office and the Office of the Vice President; and

(F) Officers and employees in offices and positions which require confirmation by the Senate, other than members of the uniformed services and Foreign Service Officers below the rank of Ambassador.

(3) *Right to Appeal.* If the approval of a legal expense fund has been denied, the requester may appeal the denial within 60 days by mail or email to the Director of the U.S. Office of Government Ethics. Requests sent by mail should be addressed to 1201 New York Avenue NW, Suite 500, Washington, DC 20005-3917. The envelope containing the request and the letter itself should both clearly indicate that the subject is a legal expense fund appeal. Email requests should be sent to usoge@oge.gov and should indicate in the subject line that the message contains a legal expense fund appeal.

(h) *Amendments.* The trust document may only be amended if the trustee and employee beneficiary file the amended legal expense fund trust document in accordance with paragraph (f) of this section and seek approval in accordance with paragraph (g) of this section.

(i) *One legal expense fund.* No employee beneficiary may establish or maintain more than one legal expense fund at any one time. An employee may not later establish a second legal expense fund for the same legal matter.

(j) *Conforming existing legal expense funds.* In order for employee beneficiaries who have existing legal expense funds to receive legal expense payments from the existing legal expense fund, the employee beneficiary must comply with §§ 2635.1005(b), 2635.1006, and 2635.1007 by [90 calendar days after the effective date of the final rule].

(k) *Public access.* Approved legal expense fund trust documents will be made available by the Office of Government Ethics to the public on its website within 30 calendar days of receipt. The trust fund documents will be sortable by employee beneficiary's name, agency, and position, as well as type of document and document date. Legal expense fund trust documents filed by anonymous whistleblowers will not be made available to the public. Legal expense fund trust documents that are made available to the public will not include any information that would identify individuals whose names or identities are otherwise protected from public disclosure by law.

§ 2635.1005 Administration.

(a) *Trustee's duties and powers.* A trustee of a legal expense fund is responsible for:

(1) Operating the legal expense fund trust consistent with this part and applicable state law;

(2) Operating as a fiduciary for the employee beneficiary in relation to the legal expense fund property and the legal expense fund purpose;

(3) Providing information to the employee beneficiary as necessary to comply with the Ethics in Government Act, 5 U.S.C. app. 102(a)(2), part 2634 of this chapter, and this part; and

(4) Notifying donors and payees that their names will be disclosed on the OGE website.

(b) *Limitation on role of employee beneficiary.* An employee beneficiary may not exercise control over the legal expense fund property.

§ 2635.1006 Contributions and use of funds.

(a) *Contributions.* A legal expense fund may only accept contributions of payments for legal expenses from permissible donors listed in paragraph (b) of this section.

(b) *Permissible donors.* A permissible donor includes:

(1) An individual who is not:

(i) An agent of a foreign government as defined in 5 U.S.C. 7342(a)(2);

(ii) A lobbyist as defined by 2 U.S.C. 1602(10) who is currently registered pursuant to 2 U.S.C. 1603(a);

(iii) Acting on behalf of, or at the direction of, another individual or entity in making a donation;

(iv) Donating anonymously;

(v) Seeking official action by the employee beneficiary's agency;

(vi) Doing business or seeking to do business with the employee beneficiary's agency;

(vii) Conducting activities regulated by the employee beneficiary's agency other than regulations or actions affecting the interests of a large and diverse group of persons;

Example 1 to paragraph (b)(1)(vii): A donor contributed to a Department of State employee's legal expense fund. The donor has recently applied to renew their United States Passport. Because the Department of State's passport renewal office affects the interests of a large and diverse group of people, the donation is permissible under paragraph (b)(1)(vii) of this section.

(viii) Substantially affected by the performance or nonperformance of the employee beneficiary's official duties; or

(ix) An officer or director of an entity that is substantially affected by the performance or nonperformance of the employee beneficiary's official duties.

(2) A national committee of a political party as defined by 52 U.S.C. 30101(14), (16)

or, for former members of a campaign of a candidate for President or Vice President, the campaign, provided that the donation is not otherwise prohibited by law and the entity is not substantially affected by the performance or nonperformance of an employee beneficiary's official duties.

NOTE 1 TO PARAGRAPH (b): Acceptance of a legal expense payment from another employee must be analyzed under subpart C of this part.

(c) *Contribution limits.* A legal expense fund may not accept more than \$10,000 from any single permissible donor per calendar year of the fund.

NOTE 2 TO PARAGRAPH (c): As discussed in § 2635.1002(b)(2), payments for legal expenses or the provision of *pro bono* legal services that otherwise qualify for a gift exclusion or exception other than § 2635.204(n) in subpart B of this part are not covered by this subpart.

(d) *Use of funds.* Legal expense fund payments must be used only for the following purposes:

(1) An employee beneficiary's legal expenses related to those legal proceedings arising in connection with the employee's past or current official position, the employee's prior position on a campaign, or the employee's prior position on a Presidential Transition Team;

(2) Expenses incurred in soliciting for and administering the fund; and

(3) Expenses for the discharge of Federal, state, and local tax liabilities that are incurred as a result of the creation, operation, or administration of the fund.

Example 1 to paragraph (d): An employee beneficiary's attorney determines it is necessary to employ an expert witness related to a legal proceeding arising in connection with the employee beneficiary's official position. Funds may be distributed from the legal expense fund to pay fees and expenses for the expert witness.

§ 2635.1007 Reporting requirements.

(a) *Quarterly reports.* An employee beneficiary must file quarterly reports that include the following information until the trust is terminated or an employment termination report is filed as set forth in paragraph (d) of this section.

(1) *Contributions.* An employee beneficiary must report the donor's name, employer,

date(s) of contribution, and amount for each donor that makes a contribution exceeding \$250 during the quarterly reporting period. For the report due January 30, an employee beneficiary must also disclose contributions from a single donor that exceed \$250 for the prior calendar year unless the contributions have been disclosed on a prior quarterly report.

(2) *Distributions.* An employee beneficiary must report the payee's name, date(s) of distribution, amount, and purpose of any distribution from the legal expense fund exceeding \$250 during the quarterly reporting period. For the report due January 30, an employee beneficiary must also disclose distributions to a single source that exceed \$250 for the prior calendar year unless the distributions have been disclosed on a prior quarterly report.

(b) *Filing of reports.* (1) The employee beneficiary must file all reports required in this section with the designated agency ethics official at the agency where the employee beneficiary is employed. The trustee or a representative of the employee beneficiary may file a report on behalf of the employee beneficiary.

(2) An employee beneficiary who is an anonymous whistleblower may choose to file reports anonymously through the employee beneficiary's trustee or representative with the Office of Government Ethics. If the Office of Government Ethics receives a quarterly report from a covert employee of the Intelligence Community, the Office of Government Ethics must handle the document as classified, according to procedures agreed upon with the employee's agency.

(c) *Reporting periods and due dates.* Quarterly reports must cover the reporting periods and comply with the following due dates:

- (1) January 1 to March 31, with the report due on April 30.
- (2) April 1 to June 30, with the report due on July 30.
- (3) July 1 to September 30, with the report due on October 30.

(4) October 1 to December 31, with the report due on January 30 of the following year.

(5) If the scheduled due date falls on a Saturday, Sunday or Federal Holiday, the report will instead be due the next business day.

(d) *Employment termination report.* If the employee beneficiary is leaving executive branch employment, the employee beneficiary must file an employment termination report no later than their last day of employment. No contributions may be accepted for or distributions paid by the legal expense fund between the date of the filing and the employee beneficiary's termination date. The report must include the following:

(1) A report of contributions received and distributions made as required by paragraph (a) of this section between the end of the last quarterly reporting period and the date of the report; and

(2) A statement as to whether the trust will be terminated or remain in force after the employee beneficiary terminates their executive branch employment.

(e) *Extensions.* For each quarterly or employment termination report, a single extension of 30 calendar days may be granted by the Director of the Office of Government Ethics, or the employee beneficiary's designated agency ethics official if filing with agency, for good cause upon written request by the employee beneficiary or the trustee.

(f) *Review of reports--(1) Designated agency ethics official review.* The designated agency ethics official must review reports within 30 calendar days of filing.

(i) *Standard for review.* The designated agency ethics official will review the report to determine that:

(A) The information required under paragraph (a) of this section is reported for each contribution and distribution; and

(B) Contributions to and distributions from the trust are in compliance with

§ 2635.1006.

(ii) *Transmission of reports to the Office of Government Ethics.* Following review, all reports must be forwarded in unclassified format to the Office of Government Ethics within seven calendar days.

(iii) *Office of Government Ethics review for anonymous whistleblowers.* The Office of Government Ethics will serve as the reviewing authority for anonymous whistleblowers who choose to file reports anonymously with the Office of Government Ethics only.

(2) *Office of Government Ethics review.* Following review by the designated agency ethics official, the Office of Government Ethics will conduct a second review of the reports of the employee beneficiaries listed in paragraph (f)(2)(ii) of this section within 30 calendar days of the receipt.

(i) *Standard for review.* The Office of Government Ethics will review the report to determine whether it conforms with the requirements established by this subpart. If defects are ascertained, the Office of Government Ethics will bring them to the attention of the reviewing agency and the employee beneficiary or the employee beneficiary's trustee or representative, who will have 30 calendar days to take necessary corrective action.

(ii) *Employee beneficiaries requiring secondary Office of Government Ethics review.* The Office of Government Ethics will review the reports of the following employee beneficiaries:

- (A) The Postmaster General;
- (B) The Deputy Postmaster General;
- (C) The Governors of the Board of Governors of the United States Postal Service;
- (D) A designated agency ethics official;
- (E) Employees of the White House Office and the Office of the Vice President; and
- (F) Officers and employees in offices and positions which require confirmation by the

Senate, other than members of the uniformed services and Foreign Service Officers below the rank of Ambassador.

(g) *Public access.* Quarterly and employment termination reports will be made available by the Office of Government Ethics to the public on its website within 30 calendar days of receipt. The reports will be sortable by employee beneficiary's name, agency, and position, as well as type of document and document date. Quarterly and employment termination reports that are made available to the public by the Office of Government Ethics will not include any information that would identify individuals whose names or identities are otherwise protected from public disclosure by law. The reports filed by anonymous whistleblowers will not be made available to the public.

(h) *Noncompliance--(1) Receipt of impermissible contributions.* If the legal expense fund receives a contribution that is not permissible under § 2635.1006, the contribution must be returned to the donor as soon as practicable but no later than the next reporting due date as described in paragraph (c) of this section.

(2) *Late filing of required documents and reports.* If a report is filed after the due date, the employee beneficiary forfeits the ability to accept contributions or distributions through the trust until the report is filed.

Example 1 to paragraph (h)(2): A Department of Labor employee establishes a legal expense fund in accordance with this subpart. Because the employee filed the trust document on February 15, the first quarterly report is due on April 30. However, the employee did not submit the first quarterly report until May 15. The employee is prohibited from accepting contributions or distributions through the trust from May 1 until May 15. Once the employee files the quarterly report, the employee may resume accepting contributions and distributions.

(3) *Continuing or other significant noncompliance.* In addition to the remedies in paragraphs (h)(1) and (2) of this section, the Office of Government Ethics has the authority to determine that an employee beneficiary may not accept contributions and distributions through the trust if there is continuing or other significant noncompliance with this subpart.

§ 2635.1008 Termination of a legal expense fund.

(a) *Cause*. A legal expense fund may only be terminated for the following reasons:

(1) The purpose of the trust is fulfilled or no longer exists; or

(2) At the direction of the employee beneficiary.

(b) *Excess funds*. Within 90 calendar days of termination of the legal expense fund, the trustee must distribute any excess funds to an organization or organizations described in section 501(c)(3) of the Internal Revenue Code and exempt from taxation under section 501(a) of the Internal Revenue Code. Funds from the legal expense fund may not be donated to an organization that was established by the employee beneficiary, an organization in which the employee beneficiary, their spouse, or their child is an officer, director, or employee, or an organization with which the employee has a covered relationship within the meaning of § 2635.502(b)(1). The trustee has sole discretion to select the 501(c)(3) organization.

(c) *Trust termination report*. After the trust is terminated, the employee beneficiary must file a trust termination report that contains the information required by § 2635.1007(d) for the period of the last quarter report through the trust termination date. The report also must indicate the organization to which the excess funds were donated. The report is due 30 calendar days following the termination date of the trust.

(d) *Exception for anonymous whistleblowers*. An employee beneficiary who is an anonymous whistleblower may choose to file the trust termination report anonymously through the employee beneficiary's trustee or representative with the Office of Government Ethics.

§ 2635.1009 Pro bono legal services.

(a) *Acceptance of permissible pro bono legal services*. An employee may solicit or accept the provision of *pro bono* legal services for legal matters arising in connection with the employee's past or current official position, the employee's prior position on a

campaign, or the employee's prior position on a Presidential Transition Team from:

- (1) Any individual who is not:
 - (i) An agent of a foreign government as defined in 5 U.S.C. 7342(a)(2);
 - (ii) A lobbyist as defined by 2 U.S.C. 1602(10) who is currently registered pursuant to 2 U.S.C. 1603(a); or
- (2) A person who does not have interests that may be substantially affected by the performance or nonperformance of an employee's official duties.

NOTE 1 TO PARAGRAPH (a): Pursuant to § 2634.907(g) of this chapter, an employee beneficiary who is a public or confidential filer under part 2634 of this chapter must report gifts of *pro bono* legal services on the employee's financial disclosure report, subject to applicable thresholds and exclusions.

(b) *Role of agency ethics official.* An employee must confer with an agency ethics official to seek a determination as to whether the legal services are from a prohibited *pro bono* legal services provider before accepting the *pro bono* legal services.

Example 1 to paragraph (b): A Department of Justice employee is an eyewitness in an Inspector General investigation and is called to testify before Congress. A local law firm offers to represent the employee at no cost. The employee consults with an agency ethics official, who determines that the attorney who would represent the employee is neither an agent of a foreign government nor a lobbyist. However, the law firm is representing a party in a case to which the employee is assigned. The ethics official determines that the law firm is a person who has interests that may be substantially affected by the performance or nonperformance of the employee's official duties. Accordingly, the employee may not accept the offer of *pro bono* legal services from the law firm.

Example 2 to paragraph (b): A Securities and Exchange Commission employee is sexually harassed by a supervisor and files a complaint. A nonprofit legal aid organization focusing on sexual harassment cases offers *pro bono* legal services to the employee at no cost. The employee consults with an agency ethics official, who determines that the attorney who would represent the employee is neither an agent of a foreign government nor a lobbyist, and neither the attorney nor the nonprofit legal aid organization has interests that may be substantially affected by the performance or nonperformance of the employee's official duties. Accordingly, the employee may accept the offer of *pro bono* legal services from the nonprofit legal aid organization.

Example 3 to paragraph (b): A Department of State employee is asked to testify in a legal proceeding relating to a prior position at the Department of Justice. An attorney at a large national law firm offers *pro bono* services to the employee. The employee confers with an agency ethics official who determines that although the attorney offering representation is neither an agent of a foreign government nor a lobbyist, the law firm is currently registered pursuant to 2 U.S.C. 1603(a) and has business before other parts of

the Department of State. However, neither the attorney nor the law firm has interests that may be substantially affected by the performance or nonperformance of the employee's official duties. Accordingly, the employee may accept the offer of *pro bono* legal services.

[FR Doc. 2022-08130 Filed: 4/20/2022 8:45 am; Publication Date: 4/21/2022]